ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

OAKWOOD HEALTHCARE, INC.
Employer

And Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC.
d/b/a GOLDEN CREST HEALTHCARE CENTER
Employer

And Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Petitioner

CROFT METALS, INC.
Employer

And Case 15-RC-8393

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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Associated Builders and Contractors, Inc. ("ABC") respectfully submits this brief as *amicus curiae* in response to the Board's Notice and Invitation to File Briefs, dated July 25, 2003, in the above-captioned cases. The Board requested parties and interested *amici* to file briefs to address "the supervisory status of the individuals in dispute in these three cases in light of the Supreme Court's decision in NLRB v. Kentucky River

Community Care, 532 U.S. 706 (2001)." See Notice and Invitation to File Briefs, at 2. The Board further asked the amici to address a series of questions relating to supervisory status generally, with reference to the three cases.

INTERESTS OF THE *AMICUS CURIAE*

ABC is a national trade association representing more than 23,000 contractors and related firms in the construction industry, both unionized and non-union, many of whom employ working foremen and/or leadmen. The supervisory status of such working foremen/leadmen in the construction industry has been frequently litigated before the Board in both representation proceedings and unfair labor practice cases. Most if not all of the issues identified in the Board's Notice have been implicated in the Board's construction industry cases, albeit in the unique circumstances pertaining to that industry and its working foremen. The Board's resolution of the broad issues raised by the present Notice could thus result in pronouncements of new policies regarding supervisory status determinations that directly affect the outcome of pending and future litigation in the construction industry.

ABC is filing this brief in order to ensure that the Board is fully aware of the possible impact that its resolution of the three present cases and their attendant issues could have on the construction industry. In this connection, ABC wishes to call to the Board's attention the pending case of Facchina Construction, Inc., Case No. 5-CA-29940, which, like the three cases referenced in the Notice, has been appealed to the Board and is now awaiting a decision.[1] In the Facchina case, Administrative Law Judge Shamwell found that certain working foremen of a construction contractor were supervisors and/or

agents of their employer, though he acknowledged that they lacked any authority to hire, fire, layoff, evaluate, discipline, assign, or reward work. Facchina, an ABC member, has filed exceptions to that decision, contending that the Judge's ruling is inconsistent with established Board precedent finding working foremen in the construction industry having comparable levels of authority not to be supervisors.

ABC has no reason to question the supervisory status of the individuals disputed in the three cases identified in the Board's Notice. However, ABC is filing this brief in order to ensure to the extent possible that any pronouncements by the Board in these three cases take into account the circumstances present in other industries, including construction, and do not needlessly depart from settled standards for determining supervisory status of disputed employees under the Act.

ABC further submits that the message of NLRB v. Kentucky River Community Care is that all supervisory status determinations require individualized factual inquiries into each disputed employee's position and role in relation to other employees in guiding the course and direction of the employer's business. As further explained below, the Board should continue to follow this totality of circumstances test, both with regard to the present three cases and in other pending and future construction industry cases before the Board.

STATEMENT OF THE CASE

The parties and other *amici* have extensively discussed the facts and history of the three cases identified in the Board's Notice. ABC defers to their statements with regard to the three cases highlighted in the Board's Notice.

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[1] By coincidence, the final Reply Brief in support of Facchina's Exceptions to the Board was due to be filed

ARGUMENT

The Supreme Court has made clear that supervisory status should be determined through a factual inquiry that considers the totality of the circumstances. See NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). In accordance with that decision, the Board should analyze each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendations and mere suggestions, and between the appearance of supervision and supervision in fact. See Demco New York Corp., 337 N.L.R.B. No. 135, 2002 WL 1765635, at *12 (2002) (citation omitted). These distinctions define and determine supervisory status.

The National Labor Relations Act was amended in 1947 to exclude supervisors from the protections of the Act. The Act was amended, in part, to remedy the upset of the "balance of power in the collective-bargaining process" caused by the "successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." Legislative History of the Labor-Management Relation Act, 1947, Vol. 1, at 409.[2]

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on the same date as the amicus briefs in the present proceeding.

[2] The Senate Report provided that:

> The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protections of the act. Disciplinary slips issued by the underground supervisory employees in these mines have fallen off by two-thirds and the accident rate in each mine has doubled.

Legislative History of the Labor-Management Relation Act, 1947, Vol. 1, at 410.

However, Congress did not want "certain employees with minor supervisory duties" to be excluded from the protections of the Act. See id. at 410. Accordingly, Congress "distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." Id.

Congress attempted to achieve this distinction through the definition of "supervisor." The Act defines "supervisor" in § 2(11), which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if an connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Accordingly, employees are statutory supervisors if: (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer." See Kentucky River, 532 U.S. at 712-13 (citing NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571 (1994).

Consistent with the statutory language and legislative intent, it is recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. See HS Lordships, 274 N.L.R.B. 1167 (1985). Indeed, as stated by the Sixth Circuit in Beverly Enterprises v. NLRB, 661 F.2d 1095 (6th Cir. 1981), "[r]egardless of the specific kind of supervisory authority at issue, its exercise

must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor."

Additionally, the exercise of independent judgment alone will not suffice for "the decisive question of whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11)." Advanced Mining Group, 260 N.L.R.B. 486 (1982). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor of the former." Id.

Determining whether an employee is engaging in one of the twelve enumerated functions and/or whether the employee is acting in the "interest of the employer," is a relatively straight-forward factual determination. It is the definition and scope of "independent judgment" that have caused considerable disagreement and litigation for the past fifty-six years. It is also this disagreement which the Supreme Court addressed in the Kentucky River decision and which the Board seeks to resolve through the pending Notice and Invitation to File Briefs.

In Kentucky River, the Court rejected the Board's attempt to exclude an employee's "professional" judgments from the definition of "independent judgment." Id. at 721. Specifically, the Court rejected the Board's interpretation that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. See id. at 714. The Court reiterated its holding in NLRB v. Health Care & Retirement Corp., 511 U.S. 570, 581 (1994), that professional employees should be treated no differently from other employees for

purposes of determining whether they possess indicia of supervisory authority within the meaning of Section 2(11) of the Act ("These contentions contradict both the text and structure of the statute . . . that the test for supervisory status applies no differently to professionals than to other employees"). Id.

Although in Kentucky River the Court clarified that the standard to determine supervisory status should be the same for all employees, the Court did not define that standard. Instead, the Court implied that the Board should continue to define independent judgment on a case by case basis depending upon the "degree" of discretion exercised by the disputed employee. See Kentucky River, supra, 532 U.S. at 713.

"Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act." Id. (quoting Weyersueuser Timber Co., 85 N.L.R.B. 1170, 1173 (1949)). The exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks." The test must be the significance of his judgment and directions. See NLRB v. Wilson-Crissman Cadillac, Inc., 659 F.2d 728 (6th Cir. 1961); and Hydro Conduit Corp., 254 N.L.R.B. 433 (1981). The standard must consider the totality of the circumstances and analyze the employee's position and role in relation to other employees in guiding the course and direction of the employer's business.

As relevant to ABC's members in the construction industry, the Board has repeatedly declared that working foremen who lack authority to hire, fire, discipline, promote, transfer, reward or assign employees, and who merely pass on routine instructions from on-the-job superintendents based on their experience, are not

supervisors. Thus, in Ironworkers Local 28 (Virginia Assn. of Contractors), 219 N.L.R.B. 957, 961 (1975), the Board approved the following findings and conclusions concerning a group of working foremen in the construction industry:

> The remainder of the evidence demonstrates that the foremen act within a very limited sphere in giving instructions to employees bounded by the blueprints and instructions from the contractor or his supervisor. Any recommendations made by the foreman with regard to discipline or discharge, are adjudged independently by the contractor. Therefore there is no competent evidence to demonstrate that the vast bulk of the foremen are anything more than pushers or strawbosses and consequently not supervisors within the meaning of the Act because they appear not to be able to effectively recommend discharge or discipline and their authority appears to be routine and not requiring the use of independent judgment.

The Board has made similar determinations in more recent cases. In Central Plumbing Specialities, Inc., 337 N.L.R.B. No. 153, slip op. at 3 (2002), for example, the Board held that assignment of work by a plumbing foreman should not be an indicator for supervisory status. According to the Board: "At best, this evidence established that he was a lead person, who, as an experienced employee, directed other employees in the performance of routine work."

Numerous other cases have also so held, particularly in construction and related industrial settings. See Vincent M. Ippolito, Inc., 313 N.L.R.B. 715, 718-19 (1994) (working foreman was not a supervisor where he did not exercise independent authority to hire, fire, promote, transfer, discipline, or recommend such action); Somerset Welding & Steel, Inc., 291 N.L.R.B. 913, 914 (1988) (working foremen were not supervisors where they directed employees in a routine manner based upon their greater skill and seniority); Zack Co., 278 N.L.R.B. 958, 963 (1986) (same). See also Westpac Electric, Inc., 321 N.L.R.B. 1322, 1333 (1996) (leadman not supervisor despite direction and assignment of work crews based upon project manager's instructions).

On the other hand, in construction cases where it was determined that an employee or foreman was a supervisor, the employee had responsibilities beyond "directing the manner of other's performance of discrete tasks." The employees had discretionary authority evidencing independent judgment. For example, in Zimmerman Plumbing and Heating Co, Inc., 325 N.L.R.B. 106, 109 (1997), the foremen were often in sole charge of jobsites, supervised other foremen and crew leaders, and were involved in hiring and discipline. See also Debber Electric, 313 N.L.R.B. 1094, 1095-96 (1994) (foreman was second-in-command to company owner and frequently in sole charge of operations); and F. Mullins Const., 273 N.L.R.B. 1016, 1020 (1984) (foremen given broad discretion to run crews on jobsites without supervision).

In each of the above cited cases, whether an employee was a statutory supervisor depended upon the position and role of the employee in relation to other employees in guiding the course and direction of the employer's business. In determining whether judgment is either "routine or clerical," or "independent," the Supreme Court approved the view that judgment is routine where an individual's decision-making discretion is limited and constrained by the directions of higher officials who have delegated the power to make independent judgments. See Kentucky River, 532 U.S. at 714 (citing Chevron Shipping Co., 317 N.L.R.B. 379, 381 (1995)).[3]

In the Facchina Construction case referenced above, now pending before the Board, the Administrative Law Judge erroneously found working foremen in construction to be supervisors, despite clear evidence that the disputed individuals' decision-making discretion was limited and constrained by the directions of a project superintendent who

was constantly present and directing and delegating work at the construction site. The Judge thereby departed without explanation from substantial Board precedent with regard to the burden of proving supervisory status of working foremen in the construction industry. Regardless of how the Board decides the three cases that are the subject of the present Notice, the Board should reaffirm its longstanding precedents with regard to the status of working foremen in the construction industry by reversing the Judge's supervision findings in Facchina Construction.[4]

SPECIFIC RESPONSES TO THE BOARD'S QUESTIONS

Question 1: What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," i.e., "what scope of discretion qualifies" (emphasis in original)? Kentucky River at 713. What definition, test, or factors should the Board consider in applying the term "independent judgment"?

ABC's Response: "Independent judgment" and the "degree of discretion" required for supervisory status must be determined on a case-by-case basis through consideration of the unique factual circumstances of each case. The degree of discretion characterized as "independent" should continue to be determined by reference to whether or not the exercise of judgment is "routine or clerical," and/or is limited and constrained by the directions of higher officials who have delegated the power to make independent judgments. See Kentucky River, 532 U.S. at 714.

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[3] See Kentucky River, 532 U.S. at 713-14 ("[I]t is undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.").

[4] ABC does not seek a ruling from the Board in the present case or in the Facchina case that construction foremen should never (or should always) be found to be supervisors. Rather, ABC relies on the Board's existing precedents with regard to supervisory status in the construction industry for the proposition that independent judgment should be determined based upon the totality of the circumstances on a case by case basis.

Question 2. What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?

ABC's Response: "Assign" implies parceling out work – with or without independent judgment. "Direct" implies overseeing the manner in which the work is performed. Either assignment or direction of work may be accomplished in a routine or non-routine manner, i.e., with or without the exercise of independent judgment. As with all determinations of supervisor status, the analysis must consider the totality of the circumstances. For instance, in Somerset Welding & Steel, Inc., 291 N.L.R.B. 913 (1988), the Board determined that an employee was not a supervisor where, in relevant part, the employee merely distributed predetermined work assignments and made sure that they were completed by predetermined specifications. Id. at 914. Working as a conduit (assigning work) in such circumstances does not normally imply the discretionary authority (the ability to direct) necessary to exercise independent judgment.

Question 3: What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct?"

ABC's Response: The meaning of the word "responsibly" in the statutory phrase "responsibly to direct" implies that the directing employee is answerable for the directed conduct. "In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product on the employees he directs." Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 490 (2d Cir. 1997).

Question 4: What is the distinction between directing "the manner of others' performance of discrete tasks" and directing "other employees"? Kentucky River, at 720.

ABC's Response: It is unclear whether the distinction between directing "the manner of others' performance of discrete tasks" and directing "other employees" provides a useful means of distinguishing of supervisory authority. It is possible that an employee solely directing "the manner of others' performance of discrete tasks" is less likely to be exercising independent judgment than an employee directing "other employees." However, it is impossible to state this as a rule because each case can have unique facts that dictate the outcome considering the totality of the circumstances. For example, in Central Plumbing Specialties, Inc., 337 N.L.R.B. No. 153 (2002), the Board held that the disputed employee was not a supervisor even though the employee "directed other employees" where such direction occurred in the performance of routine work without "any independent judgment in the exercise of these duties." Id. at 3.

Question 5: Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?

ABC's Response: There is no tension between the Act's coverage of professional employees and its exclusion of supervisors. As stated by the Supreme Court, the test for supervisor status is the same for all employees – professional or otherwise. See Kentucky River, 532 U.S. at 721. See also Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 900 (8th Cir. 2002) (denying enforcement of Board decision and holding that "Section 2(11) does not exclude judgment based on an employee's 'experience, skills,

training, or position" from the definition of independent judgment."). In Section 2(12), a professional employee's "discretion and judgment" is a definitional term defining the professional employee's personal job duties. On the other hand, "independent judgment" in section 2(11) qualifies an employee's interaction and/or relationship with other employees. Finally, nothing in the Act prohibits or requires an "entire group of professional workers" from being deemed to be supervisors based on their role with respect to less-skilled workers. Supervisory status is solely determined by examining such employees' role and position in guiding the course and direction of the employer's business, regardless of professional status.

Question 6: What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?

ABC's Response: The guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days should be the same as the guidelines for considering the supervisory status of any other employee. It should be an analysis of the totality of the circumstances.

Question 7: In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

ABC's Reponse: The guidelines for determining the status of persons who rotate in and out of supervisory positions, such that some or all persons in the classification will spend some time supervising on some days and will work as non-supervisory employees on other days should be the same as the guidelines for considering the supervisory status of any other employee. It should be an analysis of the totality of the circumstances.

Question 8: To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?

ABC's Response: Recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams should be taken into account when making supervisory determinations – only to the extent that they impact each employee's position and role in relation to other employees in guiding the course and direction of the employer's business. For instance, in Somerset Welding & Steel, Inc., 291 N.L.R.B. 913 (1988), the Board determined that "the leadmen's responsibility as safety committee members for ensuring that work is performed safely does not reflect the type of discretion indicative of supervisory status." Id. at 914.

Question 9: What functions or authority would distinguish between "straw bosses, leadmen, set-up men, and other minor supervisory employees," whom Congress intended to include within the Act's protections, and "the supervisor vested with "genuine management prerogatives." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974)(quoting Senate Report No. 105, 80th Cong., 1st Sess., 4 (1947).

ABC's Response: The "functions or authority" distinguishing between "straw bosses, leadmen, set-up men, and other minor supervisory employees" and the supervisor vested with genuine management prerogatives, are those set forth in Section 2(11). Non-supervisory workers, including many working foremen in the construction industry, are those who do not possess the degree of authority specified in the Act. Those working foremen and others who do possess the requisite authority listed in the Act are by definition vested with "genuine management prerogatives." The distinction is established through an examination of all the facts and circumstances in a case, through an analysis of the position and role of the employee in relation to other employees in guiding the course and direction of the employer's business.

Question 10: To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc. – in determining supervisory status?

ABC's Response: Where analysis of the Section 2(11) criteria do not clearly establish whether the employee is a supervisor, or "in borderline cases," the Board should look to secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off etc., whether the individual possess a status separate and apart from that of rank-and-file employees. See Demco New York Corp., 337 N.L.R.B. No. 135, 2002 WL 1765635, at *11 (2002) (citations omitted). However, where there is no evidence that an individual possesses any one of the several primary indicia for statutory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient to establish statutory supervisory status. See J.C. Brock Corp., 314 N.L.R.B. 157 (1994). See also Mont Health Care Ctr. v. NLRB, 178 F.3d 1089, 1096 n. 6 (9th Cir. 1999) ("The 'secondary indicia' of supervisory authority are only relevant '[i]n borderline cases.'"); E & L Transp. Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996); Central Plumbing Specialities, Inc., 337 N.L.R.B. No. 153 (2002) ("secondary indicia of supervisor status are not dispositive 'in the absence of evidence indicating the existence of any one of the primary indicia of such status.'").

CONCLUSION

The purposes of the National Labor Relations Act will be served by a reaffirmation of existing case law that dictates that all supervisory status determinations are factual inquiries that require an examination of an employee's position and role in relation to other employees in guiding the course and direction of the employer's business. It is a totality of the circumstances test. Any other test or limiting exclusions beyond those in the statute itself, as determined by the Supreme Court with regard to "professional judgment" in Kentucky River, would be contrary to the letter and spirit of the Act.

The Board should further recognize, regardless of the outcome of the three cases that are the subject of the present Notice, that any overly broad pronouncements regarding the issues raised in the Notice could have unintended and unnecessary consequences in other industries, including the construction industry. The Board should continue to adhere to its established precedent with regard to the status of working foremen in the construction industry, depending upon the facts and circumstances of each case.

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I hereby certify that copies of the forgoing Brief Amicus Curiae of the Associated Builders And Contractors, Inc. In Response to the Board's Notice and Invitation to File Briefs was sent by first class mail, this 22 day of September, 2003, to:

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